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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91181969
Party	Plaintiff Fetch, Inc.
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Attachments	Fetch Motion Challenging Designations (Redacted).pdf (17 pages)(4415974 bytes)

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Fetch, Inc.,	:	
	:	
Opposer,	:	
	:	Opposition No. 91181969
v.	:	Directed to App. S.N. 77/151,430
	:	
Societe des Produits Nestle, S.A.,	:	
	:	
Applicant.	:	

MOTION OF OPPOSER FETCH, INC. CHALLENGING APPLICANT
SOCIETE DES PRODUITS NESTLE, S.A.'S DESIGNATIONS
OF INFORMATION AS "TRADE SECRET/COMMERCIALLY SENSITIVE"

Opposer Fetch, Inc. ("Opposer"), through its undersigned counsel, files this motion challenging Applicant Societe des Produits Nestle, S.A. ("Applicant")'s designation of certain responses to Opposer's interrogatories as "Trade Secret/Commercially Sensitive."

I. Background

On January 17, 2008, Opposer filed a Notice of Opposition to registration of Applicant's intent-to-use application for registration of LIFETIME OF CARE, for use in connection with services described as "insurance underwriting in the field of health insurance for animals and pets," in International Class 36 (the "Application"). Opposer's opposition is based on Opposer's prior common law rights in its FOR A LIFETIME OF CARE service mark, which is used in connection with pet insurance underwriting services.

The parties have exchanged discovery requests. In its responses to Opposer's First Set of Interrogatories, Applicant designated certain information contained within the responses as "Trade Secret/Commercially Sensitive," even though the particular information at issue includes

REDACTED VERSION OF CONFIDENTIAL MOTION
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information [REDACTED]. The parties negotiated in good faith, but were unable to resolve their difference of opinion regarding Applicant's designations.

II. Argument

Opposer challenges Applicant's use of the "Trade Secret/Commercially Sensitive" designation on the ground that the responses so designated do not constitute "Trade Secret/Commercially Sensitive" information that must be restricted from any access by the parties.

Applicant claims that the designations are appropriate because Applicant will be [REDACTED], and that, according to Applicant's reasoning, disclosure could cause competitive harm to Applicant. Although there could be information exchanged during discovery that warrants the "Trade Secret/Commercially Sensitive" designation, the precise information at issue here -- [REDACTED] -- does not. Pursuant to the Standard Protective Order in effect in this proceeding, Applicant bears the burden of proving that the designated information should be protected as "Trade Secret/Commercially Sensitive" information.

Allowing an overbroad use of the "Trade Secret/Commercially Sensitive" designation sets a harmful precedent. If, for instance, [REDACTED] are considered to be "Trade Secret/Commercially Sensitive," then all intent-to-use applications, by definition, would be "Trade Secret/Commercially Sensitive." Likewise, if [REDACTED] is considered to be "Trade Secret/Commercially Sensitive," then the most basic of information could be designated as such, when reasonableness and fairness dictate otherwise.

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

The interrogatories and corresponding responses at issue in this Motion, with the statements designated by Applicant as “Trade Secret/Commercially Sensitive” appearing underlined and in bold,¹ are as follows:

Interrogatory 3: Describe in detail each service that Applicant is currently using and/or that Applicant intends to use in the future under the mark LIFETIME OF CARE.

Answer: Nestle objects to this request as overly broad and unduly burdensome to the extent the request seeks the identification of goods and/or services that Applicant is currently using. Nestle also objects to this request as not relevant to the claims or defenses of the parties. Nestle filed its application for registration under Section 1(b) of the Lanham Act, indicating that Nestle has a *bona fide* intention to use the mark at a later time, but is not currently using the mark. Subject to and without waiving the foregoing objections, [REDACTED].

* * *

¹ The underlining and bolding of the text are supplied for purposes of this Motion, and were not part of Applicant’s original answers.

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

Interrogatory 8: Identify each item of marketing material produced by or for Applicant in which the mark LIFETIME OF CARE is referred to or appears, and for each such item:

- a. State the number produced, the number distributed, and the date(s) of distribution; and
- b. Describe the categories of persons and organizations to whom/to which copies were distributed.

Answer: Nestle objects to the extent the requests seeks information which is protected by the attorney client privilege, work product doctrine or other recognized privilege. Nestle objects to this request as not relevant to the claims and defenses of the parties, [REDACTED]. Nestle objects to this request as overbroad and unduly burdensome to the extent the request seeks the identification of each individual marketing item. Nestle objects to this request as vague and ambiguous with respect to the word "distributed."

* * *

Interrogatory 9: State whether Applicant has licensed or granted authorization to any party to furnish products or services under the mark LIFETIME OF CARE. If the answer is in the affirmative, identify: all such persons to whom any such license or authorization was granted, the products or services covered by each such license and/or authorization, and the terms of each such license or authorization.

Answer: Nestle objects to the extent the requests seeks information which is protected by the attorney client privilege, work product doctrine or other recognized privilege. Nestle objects to this request as overly broad and unduly burdensome. Nestle filed its application for registration under Section 1(b) of the Lanham Act, indicating that Nestle has a *bona fide* intention to use the mark at a later time, but is not currently using the mark. Subject to and without waiving the foregoing objections, [REDACTED].

* * *

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

Interrogatory 10: State in round numbers Applicant's actual advertising expenditure for the years 2006, 2007, and 2008 for services used in connection with the mark LIFETIME OF CARE. If no such advertising expenditures have been made by Applicant, state in round numbers Applicant's budgeted or anticipated advertising expenditures for the year 2008 and for any other future years for which such expenditures have been budgeted or anticipated.

Response: Nestle objects to the discovery as not relevant to the claims or defenses of the parties. Nestle objects to this request as being vague and ambiguous with respect to "advertising expenditures." Subject to and without waiving the foregoing objections, Nestle has not yet made use of the mark in the United States. [REDACTED].

* * *

Interrogatory 15: Describe in detail how Applicant is currently publicizing and advertising, or intending to publicize and advertise, products and/or services under the mark LIFETIME OF CARE.

Answer: Nestle objects to this request as not relevant to the claims or defenses of the parties. Nestle objects to this request as overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, [REDACTED].

* * *

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

Interrogatory 17: If Applicant has not yet commenced used [sic] of the LIFETIME OF CARE mark in commerce, state the date on which Applicant's [sic] intends to first use such mark in commerce.

Response: Nestle objects to the extent the requests seeks information that is covered by the attorney-client privilege, work product doctrine or other recognized privilege. Nestle also objects to this request as not relevant to the claims or defenses of the parties. Subject to and without waiving the foregoing objections, [REDACTED].

Copies of the responses designated by Applicant as "Trade Secret/Commercially Sensitive," which were served on Opposer on August 8, 2008, are attached hereto as Exhibit A. Copies of the responses with the designated information redacted by Applicant (and which thereby provided a more precise indication of the particular statements to which the designation applies) were provided to Opposer on August 26, 2008, and are attached hereto as Exhibit B.

III. Conclusion

Because the information designated by Applicant as "Trade Secret/Commercially Sensitive" is not information properly designated as such, Opposer requests that Applicant be ordered to withdraw its "Trade Secret/Commercially Sensitive" designations.

Respectfully submitted,

Dated: September 10, 2008



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REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

EXHIBIT A

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

[REDACTED]

REDACTED VERSION OF CONFIDENTIAL MOTION
FILED WITH TTAB ON 9/10/2008

EXHIBIT B

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Fetch, Inc.

Opposer,

v.

Societe des Produits Nestle, S.A.

Applicant.

Opposition No. 91181969

Directed to App. No. 77/151,430

**APPLICANT SOCIETE DES PRODUITS NESTLE, S.A.'S RESPONSE
TO OPPOSER FETCH, INC.'S FIRST SET OF INTERROGATORIES
ADDRESSED TO APPLICANT SOCIETE DES PRODUITS NESTLE, S.A.**

Applicant Societe des Produits Nestle, S.A. (hereinafter "Nestle"), by and through its attorneys, hereby responds to Opposer Fetch, Inc.'s (hereinafter "Opposer") First Set of Interrogatories as follows:

GENERAL OBJECTIONS

- A. Nestle objects to the "Definitions" and "Instructions" set forth in Opposer's First Set of Interrogatories to the extent such Definitions and Instructions purport to impose duties, obligations, and/or responsibilities upon Nestle in excess of those required of it under the Federal Rules of Civil Procedure, the Trademark Rules of Practice, the Board's Orders and other applicable law.
- B. Nestle objects to Opposer's Interrogatories to the extent that they seek information protected from discovery by the attorney-client privilege, the work product doctrine, or any other applicable common law or statutory privilege. Nestle declines to provide any such information in response to Opposer's Interrogatories. Any information subject to

3. Describe in detail each service that Applicant is currently using and/or that Applicant intends to use in the future under the mark LIFETIME OF CARE.

ANSWER: Nestle objects to this request as overly broad and unduly burdensome to the extent the request seeks the identification of goods and/or services that Applicant is currently using. Nestle also objects to this request as not relevant to the claims or defenses of the parties. Nestle filed its application for registration under section 1(b) of the Lanham Act, indicating that Nestle has a *bona fide* intention to use the mark in commerce at a later time, but is not currently using the mark. Subject to and without waiving the foregoing objections, [REDACTED]

8. Identify each item of marketing material produced by or for Applicant in which the mark LIFETIME OF CARE is referred to or appears, and for each such item:

- a. State the number produced, the number distributed, and the date(s) of distribution; and
- b. Describe the categories of persons and organizations to whom/to which copies were distributed.

ANSWER: Nestle objects to the extent the request seeks information which is protected by the attorney client privilege, work product doctrine or other recognized privilege. Nestle objects to this request as not relevant to the claims and defenses of the parties, [REDACTED] Nestle objects to this request as overbroad and unduly burdensome to the extent the request seeks an identification of each individual marketing item. Nestle objects to this request as vague and ambiguous with respect to the word "distributed."

9. State whether Applicant has licensed or granted authorization to any person to furnish products or services under the mark LIFETIME OF CARE. If the answer is in the affirmative, identify: all such persons to whom any such license or authorization was granted, the products or services covered by each such license and/or authorization, and the terms of each such license or authorization.

ANSWER: Nestle objects to the extent the request seeks information which is protected by the attorney client privilege, work product doctrine or other recognized privilege. Nestle objects to this request as overly broad and unduly burdensome. Nestle filed its application for registration under section 1(b) of the Lanham Act, indicating that Nestle has a *bona fide* intention to use the mark in commerce at a later time, but is not currently using the mark. Subject to and without waiving the foregoing objections, [REDACTED]

10. State in round numbers Applicant's actual annual advertising expenditure for the years 2006, 2007, and 2008 for services used in connection with the mark LIFETIME OF CARE. If no such advertising expenditures have been made by Applicant, state in round numbers Applicant's budgeted or anticipated advertising expenditures for the year 2008 and for any other future years for which such expenditures have been budgeted or anticipated.

ANSWER: Nestle objects to the discovery as not relevant to the claims or defenses of the parties. Nestle objects to this request as being vague and ambiguous with respect to "advertising expenditures." Subject to and without waiving the foregoing objections, Nestle has not yet made use of the mark LIFETIME OF CARE in the United States. [REDACTED]

15. Describe in detail how Applicant is currently publicizing and advertising, or intending to publicize and advertise, products and/or services under the mark LIFETIME OF CARE.

ANSWER: Nestle objects to this request as not relevant to the claims or defenses of the parties. Nestle objects to this request as overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, [REDACTED]

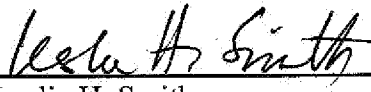
17. If Applicant has not yet commenced used (*sic*) of the LIFETIME OF CARE mark in commerce, state the date on which Applicant's (*sic*) intends to first use such mark in commerce.

ANSWER: Nestle objects to the extent the request seeks information that is covered by the attorney-client privilege, work product doctrine or other recognized privilege. Nestle also objects to this request as not relevant to the claims or defenses of the parties. Subject to and without waiving the foregoing objections, [REDACTED]

REDACTED VERSION OF CONFIDENTIAL MOTION
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Motion of Opposer Fetch, Inc. Challenging Applicant Society des Produits Nestle, S.A.'s Designations of Information as "Trade Secret/Commercially Sensitive" to be served by first class mail, postage prepaid, on September 10, 2008, upon Applicant's counsel of record at the following address:

David B. Jenkins, Esquire
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101


Leslie H. Smith